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No. 85-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

BRIEF FOR THE RESPONDENT AIR LINE PILOTS ASSOCIATION

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QUESTION PRESENTED

Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552, contains labor protective provisions, which, *inter alia,* grant a hiring preference to certain furloughed or terminated airline employees. Section 43 also authorizes the Secretary of Labor to issue regulations to implement the preference, subject, however, to a legislative veto. Did the Court of Appeals correctly conclude that the concededly unconstitutional legislative veto provision was severable from the remainder of § 43 where it found "ample evidence that the employee protection program was deemed to be an important aspect" of the Airline Deregulation Act, but "not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan"?

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BRIEF FOR THE RESPONDENT AIR LINE PILOTS ASSOCIATION

The Air Line Pilots Association, International ("ALPA") is a labor organization which is the bargaining agent for approximately 39,000 commercial airline pilots employed by 47 U.S. carriers. Because of the obvious interest of its members in the employee protection provision which was enacted for their benefit and which is at issue in this litigation, ALPA intervened as a defendant in the district court and was one of the appellants in the court of appeals.

COUNTERSTATEMENT OF THE CASE

ALPA accepts Petitioners' procedural history of this litigation. However, in their Statement of the Case, Petitioners give only cursory treatment to the legislative history of § 43, which has enabled them to characterize it misleadingly. (Pet. Br., pp. 2-5). Accordingly, we set forth below the pertinent facts concerning the passage of the Airline Deregulation Act in general, and of § 43 in particular.[1] These facts show with unusual clarity that Congress placed great importance on the labor protective provisions of the ADA, that it paid scant heed to the veto provision, and that it evinced no concern that implementation of § 43 could in any way undermine the objectives of airline deregulation.

I. The Senate Bill

A. The Senate's Deregulation Provisions

The Senate passed its version of the ADA—S. 2493—on April 19, 1978, about a month before the House Committee on Public Works and Transportation reported out its deregulation bill, H.R. 12611. 124 Cong. Rec. 10,698 (1978); H.R. Rep. No. 1211, 95th Cong., 2d Sess. (1978) (hereinafter "House Report"). The Report of the Senate Committee on Commerce, Science and Transportation which accompanied S. 2493 succinctly stated the bill's primary objective: "to provide the domestic air transportation industry with the same competitive incentives which face most other American industries." S. Rep. No. 631, 95th Cong., 2d Sess. 5 (1978) (hereinafter "Senate Report"). These competitive incentives did not exist in the airline industry, according to the Report, because the Civil Aeronautics Board ("CAB"), which was statutorily charged with issuing certificates of public convenience and necessity

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[1] The Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, 92 Stat. 1705 *et seq.*, is codified in various sections of 49 U.S.C. app. Section 43 of the ADA appears as 49 U.S.C. app. 1552.

without which an interstate air carrier could not operate, had developed and applied its certification policy in a manner which was "both substantively restrictive and administratively burdensome to new competitors." Senate Report, p. 3. Moreover, the "Board has pursued fare policies which restrict price competition at the public's expense." *Ibid.*

In legislating a response to the perceived problems, the Senate rejected a "broad discretionary approach" whereby Congress would simply "indicate its preference for increased competition in a general way, leaving the particular details of reform to the [Civil Aeronautics] Board." Senate Report, p. 4. Instead, it opted to "deprive the Board of some of its discretion" by changing existing law "in a variety of ways." *Id.* at pp. 4-5. A major objective of these specific changes was to "substantially increase . . . the ability of new carriers to enter the industry, and the ability of existing carriers to expand into new markets." *Id.* at p. 5.[2]

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[2] As summarized in the Senate Report, among the specific changes were the following:

> First, the public interest standard which the Board applies in route cases is rewritten to impose on the Board a duty to allow prices, route structures, and the nature and variety of air services to be set by the independent forces of the free market and airline management decisions, rather than the Board itself. Second, a new section provides specific procedural deadlines to which the Board must adhere. This provision will ensure that every route application receives expedited consideration. . . Third, there are two provisions which allow new entry without Board interference. The first is the Dormant Authority provision, which allows qualified new entrants to begin service in markets which have been abandoned by incumbent carriers. The second provision is Automatic Market Entry, which guarantees that every carrier will be granted at least one route each per year without seeking CAB approval of managements' market selection.
>
> [Senate Report, p. 5]

Another major objective was to "ensure price competition will be a permanent reality in domestic air transportation" by establishing a "zone of reasonableness." Senate Report, p. 5. Within that zone, the Board would be without power to suspend or reject fares; outside the zone, the Board could regulate fares, but had to evaluate them under the new pro-competition public interest standard. *Ibid.* The Board retained authority "to prevent anti-competitive fare strategies and prevent unjust discrimination." *Ibid.*

A stated concern regarding the proposed reforms was "that the movement to a more competitive airline system should be made without major disruptions to the industry or the traveling public." Accordingly, the Senate bill provided for "a gradual phase-in of the more competitive provisions over periods that var[ied] from one to ten years." Senate Report, p. 5.

B. The Senate's Labor Protective Provisions

1. The Disagreements Over Concept

As reported out of Committee and as approved largely unchanged by the full Senate, S. 2493 contained an airline employee protection program which was set forth in Section 22 of the bill. Two types of relief were to be available to eligible individuals: (1) monetary compensation for lost wages and benefits and for relocation expenses; and (2) a hiring preference within the industry, referred to as "first right of hire." Senate Report, pp. 46-49, 113-117; 124 Cong. Rec. 10,710 (1978).

The rationale for the protection program stated in the Committee report (Senate Report, pp. 113-114) was basically as follows:

- Although "regulatory reform . . . will increase the total number of jobs in the airline industry," it is nonetheless "a possibility . . . that one or more airlines will encounter such difficulties in adjusting that they will

lose enough traffic to cause a major reduction in their total labor force."

- Airline employees entered the industry and shaped their careers in reliance on a regulatory system which gave them a measure of job security.
- Whereas the carriers are given a transition period to adjust and should be able to adapt to phased-in deregulation, individual employees are not as versatile:

> . . . [A]n individual employee will be able to do little to adjust to the new structure. Many airline employees have given most of their working lives to the air transportation industry and have too much invested to leave it now. In many cases, a job shift, even within the industry would be costly because of lost seniority. Older employees looking for a new job might encounter difficulties because of their age. Since employees will not be able to adjust in the sense their employers can, the Committee believes that a reasonable program of transition assistance should be provided.
>
> . . . The Committee believes that the Congress, on behalf of the American people, must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority—the airline employees and their families who have relied on the present system.
>
> [Senate Report, p. 114]

The Committee report took note of arguments of critics of the employee protection program that airline employees are no more deserving of special protection than others in private industry adversely affected by government action, and that the program would set a bad precedent for the future. Senate Report, pp. 114-115. The Committee responded, however, that in the airline industry there had been "justifiable reliance on the stability of the regulatory

structure" over a long period, that Congress was in part to blame for leaving an outdated framework in place for so long, and that, accordingly, "very special circumstances" existed which merited an attempt to minimize the dislocations caused by deregulation. As the Committee put it, "the particular features of the airline industry and the regulated environment in which it has existed since 1938 make a temporary transitional assistance program appropriate," but "[t]he appropriateness of such programs for future regulatory reform legislation must be examined on a case by case basis." Senate Report, p. 115.

During Committee deliberations, a member of the Committee, Senator Zorinsky, had sought to limit employee protection to first right of hire. However, the limiting amendment he offered was defeated by a vote of 8-6. Senate Report, p. 206. Accordingly, at the conclusion of the Senate Report, Senator Zorinsky submitted his "Additional Views" explaining his position. Senate Report, pp. 206-11. He supported giving furloughed or terminated airline employees a priority in the hiring process of other carriers in order "to take advantage of the ebb and flow of the free enterprise system." *Id.* at 206-7. Moreover, he stated that "there is precedent for protective provisions" which he found "analogous" to first right of hire. *Ibid.* However, he strongly objected to what he deemed the unprecedented monetary compensation to "also provide funds from the federal treasury, which could conceivably cost $1 billion. . ." *Id.* at 206. In this regard, he noted that "airline employees are some of the highest paid in the nation," and he "wonder[ed] if the general public is willing to support from its tax dollars a senior pilot at $100,000 a year, not to mention fringe benefits." *Ibid.*

When S. 2493 reached the Senate floor, disagreement over the concept of labor protection—whether there should be any protection program for airline employees, and, if so, the basic form it should take—surfaced again in the debate on the bill. Senator Hatch offered an amendment

to delete Section 22 (the labor protection section) in its entirety from the bill and substitute instead a declaration that "It is the policy of the United States not to approve employee protection programs." 124 Cong. Rec. 10,679, 10,682 (1978). Although Senator Hatch complained particularly about the financial assistance portion of Section 22, his basic objection was that "there should be no special or favored treatment accorded to workers in a special and privileged industry," and that "the employee protection provisions . . . set a bad example and precedent for a trend which is not right for anybody." *Ibid.* Senator Kennedy responded that the bill contains protections for "small communities . . . for the airlines and their shareholders . . . for just about every aspect of the airline industry. . .," and, hence, it would be "unfair and unwarranted" to eliminate "the limited provisions for the protection of employees" contained in the bill. 124 Cong. Rec. 10,682 (1978). Senator Hatch's amendment was resoundingly defeated, 85-7. *Ibid.*

Senator Zorinsky renewed his effort to delete the financial assistance component of the bill, stating that his substitute first right of hire amendment "is far more liberal in application than is the present bill's provision." 124 Cong. Rec. 10,675 (1978). The floor debate reflected essentially the same arguments as were made in the Committee over the wisdom of providing federal financial assistance to airline employees adversely affected by deregulation. And, as in Committee, Senator Zorinsky lost on the issue before the full Senate by a close vote: 48-43. 124 Cong. Rec. 10,674-83 (1978).

2. The Particulars Of The Senate's Labor Protection Provision

With respect to monetary compensation, S. 2493 authorized the Secretary of Labor to make monthly assistance payments or reimbursement payments to "eligible protected employee[s]." (§ 22(a)) However, the bill set forth

in considerable detail the manner in which the Secretary was to exercise that authority:

- A "protected employee" was defined as "a person who, on the date of enactment of this section, has been employed for at least 4 years by an air carrier holding a certificate issued under section 401 of the Federal Aviation Act of 1958." (§ 22(h)(1))

- An "eligible employee" was defined as a "protected employee" who either "has been deprived of employment, or . . . has been adversely affected with respect to his compensation, on account of a qualifying dislocation." (§ 22(a))

- A "qualifying dislocation" was defined as "a bankruptcy or major contraction" of a certificated air carrier occurring within ten years after the date of the Act and resulting from the change in regulatory structure as determined by the CAB. (§ 22(h)(2))

- A "major contraction" was, in turn, defined as a reduction of at least 15 percent of a carrier's full-time employees (excluding strikers) which either had occurred, or was likely to occur, within a 12-month period (§ 22(h)(4))

- Although the Secretary of Labor was given discretion to determine the amount of monthly assistance payments, including "what percentage of salary such payment shall constitute for each applicable class or craft of employees," he was required to consult in this regard with the Secretary of Transportation, to deduct unemployment compensation, and to make further specified reductions if an individual refused to accept reasonably comparable employment even if that meant relocating. (§ 22(b))

- There was a limit of 36 on the number of monthly payments an employee could receive. (§ 22(g)(2))

- "Eligible protected" employees were entitled to receive "relocation assistance," defined as "reasonable moving expenses (as determined by the Secretary [of Labor])" incurred in obtaining new employment, as well as "reimbursement payments for any loss resulting from selling . . . [the employee's] principal place of residence at a price below its fair market value (as determined by the Secretary) or any loss incurred in cancelling such employee's lease agreement or contract of purchase relating to his principal place of residence." (§ 22(c))

S. 2493 was even more precise in spelling out first right of hire.

- A "protected" employee who is furloughed or otherwise terminated by a carrier regulated by the CAB "shall have first right of hire, in order of seniority and regardless of age, in his occupational specialty, by any other air carrier which held a certificate issued under section 401 of the Federal Aviation Act of 1958 prior to the effective date of this section." (§ 22(d)(1))

- The hiring preference was available only if the termination or furlough was the result of "a qualifying dislocation." *Ibid.*

- The hiring carrier was entitled to hire its own furloughed employees before extending the preference to others. *Ibid.*

- An individual who obtained a job at another carrier through first right of hire retained seniority and recall rights at the carrier which furloughed or terminated him. *Ibid.*

- The Secretary of Labor was instructed to prepare and publish a list of jobs available with certificated carriers, and to "make every effort to assist an eligible protected employee in finding other employ-

ment." The Secretary was also authorized to require carriers to submit relevant reports, data, and other information. (§ 22(d)(2))

In addition to the mandatory duties imposed on the Secretary of Labor—primarily determining monetary compensation levels and establishing a job list—Section 22 provided that "[t]he Secretary may issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section." (§ 22(f)(1)) Subsection 22(f)(2) then provided that the rules and regulations proposed by the Secretary had to be submitted to Congress 60 legislative days before they were to take effect, during which period they could be disapproved by a resolution of either House.

On the Senate floor, there were several attempts to amend Section 22. The Hatch and Zorinsky amendments which dealt with the basic concept and form of labor protection have previously been described. *Supra,* pp. 6-7. The Zorinsky amendment, aside from its primary objective of seeking to delete the financial assistance component of Section 22, sought as well to change some of the particulars of first right of hire so as to make it more favorable to employees. Thus, the amendment would have defined a "protected" employee as a person with only one year of airline employment, instead of four years, and would have defined "a qualifying dislocation" as any reduction in a carrier's workforce instead of a minimum 15% reduction. Senator Zorinsky's stated purpose was to further strengthen the hiring preference as a better alternative to "affording the relief of compensation from the pockets of the Nation's taxpayers." 124 Cong. Rec. 10,674-75 (1978). Senator Danforth, on the other hand, offered an amendment that would have enhanced the financial assistance component by extending the three year limit on monthly payments to up to five years and by eliminating the "15% trigger" for both monetary compensation and first right

of hire. As with the Zorinsky amendment, the Danforth amendment did not pass; the vote was 54-37 against. 124 Cong Rec. 10,680-81 (1978).

Senator Cannon, one of the primary sponsors of S. 2493, offered an amendment which did pass: deleting language which would have required the Secretary of Labor "to insure that the protected employee will not, during the period in which he is entitled to protection, be placed in a substantially worse financial position with respect to wages and fringe benefits." 124 Cong. Rec. 10,683 (1978). The stated purpose of this amendment was to make certain that the Secretary would not be legally bound to guarantee the full salary and benefits of very highly paid employees, but rather would have "discretion concerning the level of payments" in view of his "expertise and experience in providing adjustment assistance to workers." *Ibid.*

There was no discussion on the floor of the Senate concerning the legislative veto, nor was it even mentioned. The Committee report refers to the veto once, as follows:

> Eligible employees who lost their jobs would be entitled to monthly payments for a maximum of 3 years or until they were reemployed, whichever occurred first. The amount of such payment would be equal to a percentage of former wages, as determined by regulations promulgated by the Department of Labor. *These regulations will be subject to congressional review.* The committee considered setting statutory percentage figures and maximum dollar amounts, but concluded that the Secretary of Labor, after consultation with the Secretary of Transportation, will be in a better position to determine the appropriate amounts. The committee intends that the percentages chosen will result in compensation payments that are less than the employees' after-tax

> income in order to preserve maximum incentives for employees to secure comparable work.
>
> [Senate Report, pp. 116-117 (emphasis added)]

II. The House Bill

A. The House's Deregulation Provisions

The House bill, H.R. 12611, was reported out by the House Committee on Public Works and Transportation on May 19, 1978. The Committee pointed out that there was considerable dissatisfaction with the existing airline regulatory system, which had been established in 1938 and had not been substantially changed since. House Report, p. 1. The sources of that dissatisfaction, in the Committee's view, were largely the same as those identified in the report of its Senate counterpart (*supra*, p. 3): the CAB, particularly prior to 1975, tended to discourage competition in the industry "by denying or dismissing most applications for new routes, by refusing to allow new carriers to enter the trunkline industry, . . . by discouraging experiments with reduced fares . . . [,]" and by utilizing hearing procedures which "led to extensive inaction, delay, and red tape." House Report, p. 2.

The legislation recommended by the House Committee was conceptually similar to that passed by the Senate in that it, too, opted for targeted reform in specific ways—a "release of some regulatory fetters"—as opposed to giving the CAB discretionary authority to implement "total deregulation." House Report, p. 4. As the Committee report described the proposed legislation, "H.R. 12611 is a moderate reform bill which introduces more competition and less regulation of the airline industry on a gradual, controlled basis." *Ibid.* Like the Senate bill, the House bill

> . . . includes a revised policy statement requiring the Board to stress competition and to encourage low fare service and new entry into the industry. The bill also includes a fare flexibility provision

> permitting airlines to raise and lower fares by specified percentages without CAB approval. The bill also imposes procedural deadlines for CAB decisions and allows CAB to develop simplified procedures for less controversial cases.
>
> [House Report, p. 5]

Also like the Senate bill, the House bill contained provisions allowing easy access by other carriers into markets in which carriers certified to provide services were not doing so ("dormant authority") and establishing an "experimental automatic entry program under which all CAB certificated carriers will be permitted automatic entry into one market of their choice in the first calendar year after enactment." Thereafter, the CAB would report on the program, and Congress would decide whether to continue it on a more permanent basis. House Report, p. 5.

B. The House's Labor Protective Provision

Section 32 of H.R. 12611 protected airline employees from the potential effects of deregulation in a way which was far more encompassing than the more specific protection afforded by the Senate bill. For, under the House bill, no new carrier authority could be exercised at all if affected employees were thereby placed in a substantially worse position. The Secretary of Labor was charged in this regard with adhering to a minimum protection standard, but no statutory maximum was set. Thus, Section 32 provided that:

> No authority granted by this Act, or by any amendment made by this Act, shall be exercised by any carrier unless prior to each such exercise, the Secretary of Labor has certified to the Civil Aeronautics Board that the interests of the employees who may be affected thereby have been adequately protected by fair and equitable arrangements providing levels of protection no less beneficial to and protective of such interests than

> those established pursuant to section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Act, as such sections are in existence on the date of enactment of this section or are hereafter amended, except that the carrier-employer of the affected employees shall be responsible for the application of the protective arrangements to such employees and shall be reimbursed by the Secretary of the Treasury for the cost of such application. There is hereby established in the Treasury of the United States a separate account to be known as the "Airlines Employees' Protective Account" . . . to make reimbursements pursuant to this section.
>
> [124 Cong. Rec. 30,703, 30,718 (1978); House Report, p. 22]

Section 5(2)(f) of the Interstate Commerce Act, which was then codified as 49 U.S.C. § 5(2)(f) and subsequently recodified as 49 U.S.C. § 11347, provided *inter alia* that affected employees of the carriers involved will not be in a worse position with respect to their employment for at least four years, and that the protective arrangements be at least as favorable to the employees as were ordinarily required prior to February 5, 1976.[3] Section 405 of the Rail Passenger Act, 45 U.S.C. § 565, mandated "fair and equitable arrangements to protect the interests of employees," which

> . . . shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (in-

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[3] February 5, 1976 was the date of enactment of the Railroad Revitalization and Regulatory Reform Act of 1976. Pub. L. 94-210, 90 Stat. 31. Section 402 of that Act, 90 Stat. 62, amended Section 5(2)(f) of the Interstate Commerce Act to require the ICC to impose arrangements no less protective of the interests of employees "than those heretofore imposed pursuant to this subdivision. . ."

> cluding continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs.

The House Committee report briefly summarized the gist of the House bill's employee protection provision, but otherwise did not discuss it. House Report, p. 22. The report did, however, list the employee protection program as among the "important provisions of H.R. 12611." *Id.* at p. 5.

H.R. 12611 was considered and passed by the full House on September 21, 1978. 124 Cong. Rec. 30,661-718 (1978). The labor protective provision, as reported out by the Committee, was adopted without apparent controversy or discussion. *Id.* at 30,703. The provision contained no legislative veto language, and none was proposed or even mentioned on the House floor.

III. The Conference Committee And Subsequent Enactment

As stated in the Conference Report, the employee protection provision that emerged from the House-Senate Conference Committee and was ultimately enacted as § 43 of the ADA "[i]s basically the same as the Senate bill." H.R. Rep. No. 95-1779, 95th Cong., 2d Sess. 105 (1978) (hereinafter "Conf. Rep."). However, under pressure from the House conferees, the protection provision was liberalized in several respects. Perhaps most important, the "qualifying dislocation" requirement was dropped for first right of hire, though it remained as a condition for financial assistance. Conf. Rep., pp. 48-51, 105-106. Thus, in

order to obtain the hiring preference granted by § 43, a "protected" employee would not have to meet the heavy burden of showing that his termination or furlough was the result of a "bankruptcy or major contraction . . . the major cause of which is the change in regulatory structure provided by the Airline Deregulation Act . . . as determined by the Civil Aeronautics Board." § 43(h)(2) (definition of "qualifying dislocation"). On the other hand, language was added making clear that employees furloughed or terminated "for cause" were ineligible for the hiring preference. Conf. Rep., p. 105; § 43(d)(1). The requirement that employees entitled to the preference be hired in order of seniority was deleted, but the "regardless of age" language was retained. *Ibid.*

Financial assistance was made somewhat easier to obtain because a "major contraction"—one of the elements of a "qualifying dislocation"—was redefined as a work force reduction of at least $7^1/_2$ percent, rather than 15 percent. Conf. Rep., p. 105; § 43(h)(4). Also, the limit on the number of monthly assistance payments was increased from 36 to 72. Conf. Rep., p. 105; § 43(e)(1). However, the words "subject to such amounts as are provided in appropriation Acts" were inserted in subsections (b)(1) and (c) of § 43, thus removing any possible doubt that all monetary compensation authorized by the provision was contingent on future appropriations.

With regard to both the guidelines for financial assistance which the Secretary of Labor was directed to issue and such other rules and regulations "as may be necessary" for the program, the Secretary was placed under a time constraint: they were to "be promulgated within six months after the date of enactment of this section." § 43(f)(2); Conf. Rep., p. 105. Moreover, a "report and wait" requirement was added to the one-house legislative veto provision: *i.e.*, thirty days prior to issuance, the Secretary was obligated to submit any final rule or regulation to the Senate Commerce, Science and Transportation Com-

mittee and to the House Public Works and Transportation Committee. § 43(f)(3); Conf. Rep., p. 106.

The Conference Report on the ADA was agreed to by the Senate by a vote of 82 to 4 without any significant debate on the employee protection provision. 124 Cong. Rec. 37,416-21 (1978). Senator Cannon described the provision as "important" (*Id.* at 37,416), and Senator Pearson called it "an acceptable compromise that all sides can live with" (*Id.* at 37,417-18).

The House, by a vote of 356 to 6, likewise agreed to the Conference Report. 124 Cong. Rec. 38,526-27 (1978). Congressmen Andersen, Snyder, Johnson, Harsha, and Minetta all commented on the importance of the employee protection provision. *Id.* at 38,521-25. Representative Anderson, who presented the Conference Report, specifically pointed out that the "House provisions on employee protection . . . were stronger than those in the conference bill," but that the House conferees had succeeded in making the Conference bill "considerably stronger" than the Senate bill. 124 Cong. Rec. 38,522 (1978). Representative Harsha, a member of the conference committee, complained that he was not "totally satisfied" with the conference agreement because

> . . . benefits are not to be paid an employee who loses his job . . . until there is at least $7^1/_2$ percent employee reduction in the airline. It makes no sense . . . to defer these benefits until this percentage trigger is reached, causing employees who have not found a job to suffer needlessly. However, in the spirit of compromise we managed to reduce by one-half the percentage trigger in the Senate bill.
>
> [124 Cong. Rec. 38,523 (1978)]

Congressman Minetta, who had been deeply involved in drafting the House's labor protection provisions, elaborated further:

> The Committee on Public Works and Transportation struggled with the problem of employee protection for quite some time before it came around to support almost unanimously the employee protection provision I offered. . .
>
> The labor protective provisions in the House-passed bill were reasonable, responsible legislation. These provisions were to be based on levels of protection established pursuant to section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Service Act. The levels of protection would have assured that an affected employee would not be in a worse position with respect to his employment as a result of passage of the act. An employee who suffered reduction in salary or who was deprived of employment would have been eligible for 100 percent of his average monthly salary for up to 6 years, with moving expenses if necessary and a 12-month lump sum separation payment option. . .
>
> By comparison with the House-passed provision, the conference agreement—which was based on the Senate language—is not much protection at all.

[124 Cong. Rec. 38,524-25 (1978)]

Concerning the legislative veto provision, Congressman Levitas, in the course of commenting on several other provisions of the bill, stated:

> Finally, Mr. Speaker, I cannot let this moment go by without making this observation. While there have been several bills sent to the President this year and signed by him which contained a provision for a congressional veto, I am happy to say that this piece of legislation contains a

> one-House veto over the regulations which may be issued by the Secretary of Labor on the labor protection provisions, so that the Congress and not an unelected bureaucrat will have the final word on the regulations that will have the effect of law.
>
> [124 Cong. Rec. 38,524 (1978)]

Representative Levitas' "observation" is the sole reference to the veto in either the House or Senate debate on the ADA.

SUMMARY OF ARGUMENT

The court of appeals concluded that the veto provision is severable from the remainder of § 43 because the legislative history provides overwhelming evidence that Congress considered the protections afforded employees by that section to be important, but there is no evidence that Congress regarded the veto as significant. As the court pointed out, the legislative history is barren "of any direct statement evidencing a Congressional intent of inseverability;" hence, the case against severability is entirely circumstantial. 766 F.2d at 1563 (Pet. 24a-25a). The record fully supports the court's determination that the circumstances fall "far short" of establishing the requisite intent; if anything, they "positively" buttress the holding in favor of severability. 766 F.2d at 1561, 1565 (Pet. 19a,. 28a).

First, there were only a handful of votes in the Senate opposed to § 43; the House wanted an even stronger employee protection provision; and the committee reports and comments made in debate confirm that labor protection was deemed to be a vital part of the ADA. Notwithstanding uncertainty over the economic consequences of deregulation on airline employees generally, Congress was not uncertain about the need to assist individual employees who had made a career commitment to the industry when it was regulated and relatively stable and who might be

furloughed or terminated through no fault of their own in the new competitive environment.

Second, the authority delegated in § 43 which is subject to the legislative veto is not the sort of authority which Congress has historically been reluctant to part with out of fear that an unchecked delegation would undermine traditional legislative prerogatives. There was no concern that § 43 might permit an unwarranted expansion of executive branch power at the expense of the legislative branch.

Third, the veto provision was not the result of any compromise between the House and the Senate. The provision was in the Senate bill from the outset, and it played no role in the House's eventual acceptance of the Senate's labor protection concept. In fact, the House was willing to delegate far greater authority to the Secretary of Labor to formulate protective arrangements for airline employees without subjecting that authority to a legislative veto.

Fourth, there is no support in the record for Petitioners' argument that Congress was afraid that the Secretary of Labor's administration of § 43 would defeat the objectives of airline deregulation, and, accordingly, inserted the veto provision to allow Congress to check the Secretary's authority. No concern of that nature appears in the committee reports or in floor debate. Moreover, neither of the two components of § 43 present any potential for interfering with deregulation. Financial assistance payments from federal revenues to terminated or furloughed employees would obviously have no bearing on airline operations. Nor would first right of hire impair a carrier's competitive position. The carrier's ability to enter new markets and to price its services remains unaffected because first right of hire does not increase a carrier's labor costs, but merely requires a carrier who is otherwise hiring to give a preference to eligible individuals who meet that carrier's qualifications and are willing to work for the wages and under the working conditions established by

the carrier. If anything, by hiring individuals with considerable experience in the industry, a carrier is likely to improve its ability to compete.

Fifth, especially with regard to first right of hire, § 43 sets forth the nature of the benefits provided in considerable detail. The authority delegated to the Secretary of Labor is circumscribed and quite routine. There is nothing in such a delegation which suggests that the Senate, in enacting a labor protective provision with a veto, and the House, in acquiescing in the Senate's version, regarded the legislative veto as an indispensable rein on the Secretary's authority.

Sixth, had the House's labor protection provision been enacted, the Secretary would have been given extremely broad authority to impose labor protective provisions. The Secretary's decision-making could significantly affect the nature and pace of deregulation under the House bill because "[n]o authority granted by . . . [the Airline Deregulation] Act" could be exercised without a certification from the Secretary that the employees had been adequately protected (*supra*, p. 13). That the House was willing to give the Secretary this authority without attaching a legislative veto to it, and only reluctantly acceded to the Senate's far more modest labor protective provision, compellingly demonstrates that the veto was irrelevant to House action.

Seventh, the legislative history of § 43 indicates that the most likely explanation for the veto provision is that the Senate wanted to retain a check on the financial assistance payment levels established by the Secretary. Since the payments were to be based on wages, these levels could prove to be politically sensitive in view of the high earnings of many airline employees. Nonetheless, although the veto was useful and desirable, it was not essential: financial assistance payments depended on future appropriations, and thus the appropriations process gave Congress the

requisite means to keep a rein on the Secretary if for any reason the veto could not be utilized.

Eighth, in any event, all that is at issue in this case is first right of hire, and there is nothing in the legislative history which ties the veto to that component of § 43. First right of hire can and should be implemented without regard to whether the financial assistance component of § 43 is also implemented. Congress preferred that displaced airline employees obtain jobs, and only if they could not was financial assistance to be made available.

Ninth, the addition of a "report and wait" requirement to the veto provision does not show that the veto was crucial to the enactment of § 43. If anything, "report and wait" diminishes the importance of the veto because it ensures that Congress will receive sufficient advance notification of proposed regulations to overrule them through the normal legislative process should it be dissatisfied. The significance of the veto provision in § 43 further recedes in light of the far more elaborate veto provisions Congress inserted in other statutes. The comparison shows that Congress attached a much higher priority to legislative review in those situations than it did here.

Finally, the court of appeals' severability analysis is not invalid because the court considered whether Congress would have preferred § 43 without the veto to an ADA without a labor protective provision. The court's opinion reflects a thorough canvass of the legislative history in an effort to ascertain legislative intent. The court, in fact, found "not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan." (766 F.2d at 1564 (Pet. 28a)). Moreover, there is "not a shred of evidence" either that, but for the legislative veto in § 43, Congress would have enacted a different labor protective provision than it did. Accordingly, it is clearly not "evident" that Congress chose § 43 over other alternatives because of the veto provision, and that, absent the

veto, § 43 would have failed of passage. In this context, and in light of the practical realities, it was entirely appropriate for the court to search for the dominant legislative intent as between preserving § 43 without a veto and tearing down the section in its entirety.

ARGUMENT

I. There Is No Persuasive Basis For Concluding That The Legislative Veto Provision Was Crucial In Any Material Respect To The Enactment Of § 43

A. The Evidence To Support A Determination of Inseverability Is Completely Lacking Here

In *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 931-932 (1983), this Court, reaffirming and quoting from *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) and *Champlin Refining Co. v. Corporation Comm'n.*, 286 U.S. 210, 234, (1932), stated "that the invalid portions of a statute are to be severed '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' " Petitioners assert no disagreement with this standard. (Pet. Br., p. 14) They argue, however, that it means that "a statutory section containing an invalid provision must fall in its entirety if it appears that absent the invalid part, Congress would have enacted *either* no provision at all *or* one with different form, content or language." (Pet. Br., pp. 14-15) But even with the gloss that Petitioners place on the *Chadha/Buckley/Champlin Refining* standard, the fundamental inquiry is the same: it still must be "evident" that the invalid portion was crucial to passage of the statutory section in question; and, with respect to an unconstitutional legislative veto provision, it still must appear that Congress would have been unwilling to delegate the authority it did unless it could retain a check on that authority by way of the veto. *American Federation of Government Employees v. Pierce*, 697 F.2d 303, 307 (D.C. Cir.

1982); *Consumer Energy Counsel of America v. FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216 (1983). That showing simply has not been, and cannot be, made here. For, as the court of appeals found, the evidence is "[a]mple. . . that the employee protection program. . . was deemed by Congress to be an important aspect of the [Airline Deregulation] Act," whereas, "[i]n contrast, there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan." 766 F.2d at 1565 (Pet. 28a).) If, as we now demonstrate, the court was correct in concluding that the veto provision was not "deemed to be a vital feature" of § 43 by Congress, it follows that affirmance would be appropriate even under Petitioners' formulation. In other words, as the legislative record confirms, it is far from evident that Congress would have chosen to enact no program at all, or a substantially modified § 43, rather than enact the section as it now stands without the veto.[4]

Although Petitioners do not directly attack the court of appeals' finding that Congress regarded the employee protection program as important, they do so inferentially by referring to what they term the "congressional uncertainty about the need for labor protection" in the ADA. (Pet. Br., pp. 4, 37) Presumably, Congress would be more inclined to insist on retaining a legislative veto over regulations implementing a program the necessity of which was

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[4] In *Regan v. Time, Inc.*, ___ U.S. ___, 104 S.Ct. 3262, 3269, (1984), Justice White's plurality opinion stated: "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." Justice Brennan, dissenting in part, was of the view that "severability is exclusively a question of legislative intent." 104 S.Ct. at 3275. Under either view, the finding of the court of appeals that the veto provision was not considered by Congress to be "vital" to § 43—if that finding is borne out by the record—should be dispositive of the severability issue.

in doubt than a program it definitely wanted. However, as Petitioners concede (Pet. Br., pp. 9-10), § 43 was viewed by Congress as a form of insurance. The impact of the deregulatory provisions of the ADA on employees in the airline industry could not be accurately predicted. On the one hand, the proponents of deregulation anticipated that air travel would increase, which, in turn, would bring increased employment opportunities. On the other hand, it was fully recognized that individual employees might well be adversely affected by deregulation as some airlines contracted or went out of business while other airlines prospered and expanded. *Supra*, pp. 4-5; 766 F.2d at 1562 (Pet. 22a). Section 43 was no different than most common forms of insurance: there was uncertainty over the extent to which the contingencies on which the benefits were predicated would materalize; but there was no serious doubt as to the need for protection if they did. In the Senate, an amendment to eliminate § 43 in its entirety was overwhelmingly defeated 85-7. *Supra*, p. 7. And in the House, a labor protective provision which was perceived as far more expansive was passed without controversy. *Supra*, p. 15.

There is no persuasive evidence that Congress would have failed to enact § 43 were it not for the legislative veto. To begin with, § 43 does not delegate authority which has traditionally been jealously guarded by Congress. For instance, there is nothing in § 43 remotely comparable to the authority to restructure the Executive Branch contained in the Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29, codified at 5 U.S.C. §§ 901 *et seq.*, which was at issue in *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984) (legislative veto provision found severable), in *EEOC v. CBS*, 743 F.2d 969 (2d Cir. 1984) (severability rejected), and in *Muller Optical Co. v. EEOC*, 743 F.2d 380 (6th Cir. 1984) (severability question not ripe for decision in absence of actual use of veto by Congress). We do not have here delegated authority analogous to the

authority to establish pay schedules for federal employees contained in the salary adjustment statutes at issue in *McCorkle v. U.S.*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (veto proviso held inseverable). No danger exists that the delegation in § 43 might work an unintended shift of govenmental powers as between the separate branches. *See Consumer Energy Council v. FERC, supra*, 673 F.2d at 445, n. 70. Section 43 does not constitute "definitive legislation" which was carefully "designed . . . to mark the limits of Congressional and Presidential power" over appropriated funds. *City of New Haven v. United States*, ___ F.Supp. ___,___ (No. 86-0455) (D.C. D.C. May 16, 1986), slip. op., p. 7 (legislative veto in Budget and Impoundment Control Act of 1974, 2 U.S.C. § 681 *et seq.*, held inseverable).

Moreover, the circumstances with respect to § 43 are not at all like those in *American Federation of Government Employees v. Pierce, supra*, in which one house of Congress acceded to the other house's legislation in lieu of its own, but only reluctantly and after insisting on the insertion of a veto restriction as the price of its acquiescence. True, the House was reluctant to agree to the Senate's labor protective provision. But that was only because the Senate bill was viewed as insufficiently protective of employee interests. *Supra*, pp. 17-18. Furthermore, the veto provision was in the Senate bill from the outset; the record is devoid of any indication that it was inserted in either the initial or the final version of § 43 as the price of House agreement. Of far greater significance is that the House first passed a deregulation bill, H.R. 12611, which gave the Secretary of Labor broad latitude—indeed, far broader than that in the Senate bill—to fashion labor protection arrangements for airline employees, and yet the House attached no legislative veto leash to the Secretary's authority. *Supra*, pp. 13-15. If the House was willing to enact the expansive and non-specific labor protective provision of H.R. 12611 without any veto language, it is log-

ical to assume that it likewise would have been willing to enact § 43 without the veto restriction. As the court of appeals put it, "[i]t seems . . . unlikely that a program offering less protection would have occasioned a call for even greater legislative control over the bureaucracy." 766 F.2d at 1565 (Pet. 28a).

B. Petitioners Are Mistaken In Asserting That The Veto Provision Resulted From Congressional Concern That Administration Of § 43 Might Conflict With Airline Deregulation Objectives

Petitioners argue, however, that a legislative veto was "critical" to enactment of Section 43, but not to the labor protective provision of H.R. 12611, because § 43 "created a program fundamentally inconsistent with the overall deregulatory purpose manifest throughout the Act" (Pet. Br., p. 29). They particularly assert that Congress was especially fearful of first right of hire "regulations that would displace marketplace hiring decisions and . . . thwart the Deregulation Act's overall purpose by overburdening covered carriers" (*Id.* at 30). Petitioners are demonstrably wrong in their contentions.

As shown *supra*, pp. 2-4, 12-13 the type of deregulation that Congress sought to accomplish through the ADA was to substantially increase the ability of new carriers to enter the industry and of existing carriers to expand into new markets, as well as to ensure greater non-predatory fare competition among carriers. First right of hire does not contravene those stated objectives. It clearly does not prevent new entrants from coming into the industry or limit the ability of existing carriers to expand into new markets. And it does not undercut the competitive position of any carrier because it does not require a carrier to do any hiring that it does not plan to do, and does not preclude the carrier from recalling its own furloughed employees before hiring others. Nor does § 43 compel a carrier to pay any higher wages or grant any more favorable work-

ing conditions to an individual entitled to the preference than it would if it hired someone not so entitled. Except for age, a carrier need only hire those who meet its own qualifications, notwithstanding that those qualifications are more stringent than the minimum Federal Aviation Administration qualifications or the qualifications of other airlines.[5] To the extent that compliance with the preferential hiring requirement presents any administrative burden to a carrier, that burden is so slight and its cost so small as to be inconsequential with respect to the carrier's ability to compete. Surely, if there had been any concern in Congress about the impact of first right of hire on the ability of existing carriers to compete in a deregulated environment, that concern would have surfaced in the various committee reports or in floor debate. However, there is nothing in the legislative history which so much as suggests that Congress thought this to be a potential problem or otherwise saw any burden to carriers in first right of hire. For all that appears, it is more likely that Congress accepted the commonsense notion that carriers would benefit by hiring experienced individuals.[6]

There is another equally persuasive reason why Congress manifested no misgivings regarding the authority it delegated to the Secretary of Labor to issue such regulations as "may" be necessary to administer first right of hire: the statutory language defining those entitled to the hiring preference—"protected" employees—was sufficiently elaborate as to leave little in the way of substantive discretion to the Secretary. Thus, the statute was fairly

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[5] Department of Labor regulations implementing first right of hire, which are currently in effect, confirm that carriers are entitled to impose their own qualifications. 29 C.F.R. § 220.21, 50 Fed. Reg. 53103 (Dec. 27, 1985).

[6] Nor is there any suggestion in the legislative history that the financial assistance component of § 43 could frustrate the deregulation objectives of the ADA. Payments which would come from federal revenues could only help disadvantaged employees, not harm the airlines.

detailed in spelling out eligibility requirements and mandating the class of carriers who are obliged to grant the preference; in specifying the manner in which age, seniority, and discharge for cause could or could not be taken into account; in limiting the preference to an individual's occupational specialty; and in permitting a carrier to hire its own furloughed employees before being required to hire others entitled to the preference. *Supra*, pp. 7-10, [illegible], 15-16. As the court stated in *McDonald v. Piedmont Aviation*, 625 F. Supp. 762, 766 (S.D.N.Y. 1986), a private action brought by an individual pilot claiming the defendant carrier wrongfully denied him first right of hire under § 43, "the statute delineates unambiguously the rights and duties of the parties and identifies specifically to whom they should apply," so much so that "the adoption of regulations is hardly necessary to the enforcement of Section 43 of the Act."

And, indeed, the Labor Department's implementing regulations tend to confirm that appraisal. Except insofar as they reiterate the statutory requirements or reflect what § 43 clearly seems to require (*e.g.*, that a "qualifying dislocation" is not a prerequisite for first right of hire, 50 Fed. Reg. at 53094-95), their focus is on the sort of mechanical details—notices to be sent, information to be submitted and published, and procedures to be followed—which could scarcely be considered of much interest to Congress. 29 C.F.R. Part 220, 50 Fed. Reg. 53094-53105 (Dec. 27, 1985). Arguably, the Secretary made "policy" decisions in requiring carriers to wait 30 days after notifying the Labor Department of a vacancy before hiring an applicant not entitled to first right of hire (50 Fed. Reg. at 53095), and in allowing a carrier having a specific equal employment opportunity requirement to place that requirement ahead of its first right of hire obligation (50 Fed. Reg. 53096). But these are ordinary pragmatic administrative determinations which merely serve to highlight the routine nature of the authority delegated to the Secretary.

By contrast, the authority that would have been delegated to the Secretary of Labor in the House bill is of a different level entirely. Had the House bill become law, the Secretary was not merely authorized, but virtually instructed, to play a major role in regulating the pace of deregulation because no authority granted by the ADA could be exercised until the Secretary certified that affected employees were protected. *Supra*, p. 13. And the Secretary was not only directed to ensure that the affected employees were not put in a worse position, but also given extremely broad powers to achieve that result. *Supra*, pp. 13-14. The guidelines set by reference to Section 5(2)(f) of the Interstate Commerce Act and Section 405 of the Rail Passenger Act are general ones, and, by the very terms of those provisions, are only a floor, not a ceiling. *Supra*, pp. 13-15.

To be sure, as Petitioners point out (Pet. Br. p. 33), the arrangements imposed by the Secretary would likely deal "with specific companies, workers, route terminations, and employment dislocations that were a direct result of some private transaction or government approval." But that would provide small comfort to any carrier seeking to utilize the new authority contained in the ADA. No such carrier could do so without contemplating the economic consequences that would flow from the labor protective arrangements likely to be imposed by the Secretary. The cost of those arrangements would inevitably be calculated by airlines in deciding whether, under the aegis of the ADA, to consolidate or terminate routes, to expand into new markets, to merge with another carrier, or to establish a lower fare structure. Obviously, the Secretary's authority to require such arrangements would become a significant factor in this kind of airline decision-making. Nonetheless, the House was willing to give the Secretary this authority without proposing or even discussing any restraint on the Secretary by way of a legislative veto limitation.

In short, analysis of the legislative history reveals that it was not the impact of Section 43 on deregulation that evoked Congressional concern, but rather the potential impact of deregulation on airline employees that caused a concerned Congress to ameliorate the effects of that impact without changing the deregulation process itself.

Moreover, unlike the speculative and implausible explanation advanced by Petitioners in an effort to demonstrate that § 43 would not have been enacted without a legislative veto, there is a perfectly straightforward explanation which fits logically with the legislative history as to why the Senate inserted a non-essential veto provision in § 43 and the House went along with it. Thus, the aspect of § 43 that provoked significant controversy in the Senate was the financial assistance component. Senator Zorinsky's effort to defeat it in Committee lost by a narrow margin as did his renewed attempt on the Senate floor. *Supra*, pp. 6-7. Both the Committee Report and floor debate reflected Congressional anxiety about the overall cost to the Treasury and the political sensitivity of salary protection for individuals with high earnings. *Supra*, pp. 6-7, 10-12. In fact, § 43 was successfully amended by Senator Cannon on the Senate floor to ensure that the Secretary of Labor was authorized to establish payment levels which were below that of full salary and benefits. *Supra*, p. 11. By contrast, there was no specific controversy over first right of hire. Senator Hatch, who opposed any employee protection provision on principle, garnered only seven votes in support of his amendment to eliminate § 43 in its entirety (*supra*, p. 7), and other Senators commented on the importance of the provision. *Supra*, pp. 7, 17. Senator Zorinsky, notwithstanding his opposition to financial assistance, had no difficulty in accepting first right of hire and even introduced an amendment to strengthen the hiring preference. *Supra*, pp. 6, 10. Significantly, the only mention of the veto provision in the Senate was not made in connection with first right of hire, but rather was in

regard to financial assistance: the Senate Report explained that, although the Committee had considered setting wage percentage figures and maximum dollar amounts, it had decided to let the Secretary of Labor do that by regulation, and that such "regulations will be subject to congressional review." *Supra,* p. 11. The Senate Report thus unmistakably ties the veto provision to the Congressional interest in reviewing the Secretary's performance of his assigned task of determining payment levels. All of these circumstances persuasively support an inference that the motivating factor for the veto provision in the Senate, where it originated, was a desire to retain a Congressional check on the substantive details of the financial assistance program.

The House, which acceded to the Senate version of § 43 after changes favorable to employees were made in Conference, had no reason not to accept the legislative veto restriction contained therein. For all that appears—with one exception—the veto restriction made no difference one way or another in the House. The exception is the lone comment of Congressman Levitas (*supra,* pp. 18-19) expressing approval of the presence of a legislative veto in § 43. However, as the court of appeals pointed out, "[b]y his own description, Rep. Levitas was 'making [an] observation,' . . . not setting forth what he was maintaining to be an indispensable legislative ingredient of an acceptable bill." 766 F.2d at 1563, n.12 (Pet. 23a). Moreover, "Rep. Levitas was a vigorous advocate generally for the proposition, eviscerated by *Chadha,* that Congress must retain control over administrative agencies via the legislative veto device." 766 F.2d at 1563 (Pet. 24a), citing Levitas & Brand, *The Post Legislative Veto Response: A Call to Congressional Arms,* 12 Hofstra L. Rev. 593, 611-12 (1984). However, "there is not a shred of evidence that Rep. Levitas' statement represented the view of Congress as a whole (or even his full Committee) [he was a member of both the House and Conference committees which consid-

ered the ADA], nor is there any indication that Congressman Levitas himself attached especial significance to this particular veto provision, as opposed to his keen interest generally in seeing the incorporation of such devices in legislation enacted by the Congress." 766 F.2d at 1563 (Pet. 25a). In short, the evidence is lacking that Representative Levitas himself, much less any other representative, would have voted against the conference substitute had the legislative veto not been a part of § 43. *See, Consumer Energy v. FERC, supra,* 673 F.2d at 443-444 ("Nothing in these dozens of remarks remotely indicates that these proconsumer arguments would have changed into opposing arguments had Phase II not been made subject to legislative review.").

Even though the Senate may have preferred that Congress retain a veto over the Secretary of Labor's administration of financial assistance authorized by § 43, it is by no means apparent that the Senate would have been unwilling to enact the same authorization absent a veto once the Conference Committee inserted qualifying language making certain that all monetary compensation authorized was contingent on subsequent appropriations. *Supra,* p. 16. The appropriations would then provide an absolute Congressional check on the financial assistance program.[7] Furthermore, there is absent from the legislative history here the type of strong, positive indications which courts have relied on in other cases to find that the substantive provisions of a bill would not have been enacted in the absence of a veto provision.[8]

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[7] 1 Mezines, Stein and Gruff, *Administrative Law* § 3.02 at 3-61 and authorities cited therein at n. 1 ("The denial or reduction of appropriations because of administrative or executive action of which Congress disapproves" is "one of the most commonplace methods of Congressional control. . .").

[8] In *McCorkle v. U.S., supra,* 559 F.2d at 1262, the Fourth Circuit emphasized that, when some members of Congress protested during

In any event, it is academic whether the financial assistance portion of § 43 would have been enacted without the veto reservation. Because Congress has never appropriated any funds to provide such assistance and may never do so, it is immaterial whether or not the veto provision was crucial to passage of that portion of § 43. All that is presently operative is first right of hire, and there is every reason to go forward with that part of the program even if a legitimate question could be raised concerning the other part. Although, as Petitioners assert (Pet. Br., p. 3), first right of hire and financial assistance are "closely linked components," the linkage is one in which the hiring preference is the remedy of choice for cushioning the impact of deregulation on airline employees, and monetary compensation is a secondary or fallback remedy. To the

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vigorous debate that a federal pay bill would delegate excessive authority to the President, the bill's defenders repeatedly responded "that Congress could veto the President's suggestions." In *EEOC v. CBS*, *supra*, 743 F.2d at 972-973, the Second Circuit emphasized that the Reorganization Act was viewed as a compromise in which the veto provision played such a central role that Congress, warned of possible constitutional problems, nevertheless decided "the risk [was] worth taking" and, accordingly, rejected efforts to delete the provision or add a severability clause. In *American Federation of Government Employees v. Pierce*, *supra*, 697 F.2d at 306-307, the District of Columbia Circuit emphasized that the legislative veto language was the result of a compromise, and that severance would produce a result—a complete ban on reorganizing the Department of Housing and Urban Development—which Congress plainly did not intend. And in *City of New Haven v. United States*, *supra*, slip op., pp. 7, 9, the district court emphasized that "Congress was intent upon recovering its primacy in matters of money and spending for all time," and the "one-House veto was specifically extolled as an integral component of the control machinery being considered." *Compare, EEOC v. Hernando Bank*, *supra*, 724 F.2d at 1192 ("Mere uncertainty about the legislature's intent is insufficient to satisfy the test announced in *Buckley v. Valeo.*"); *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 (Temp. Emer. Ct. App.), *cert. denied*, 105 S.Ct. 173 (1984) (fragility of a compromise is insufficient to establish non-severability in the absence of "a clear indication" that the statutes would not have been passed without legislative veto provisions).

extent employees entitled to first right of hire are successful in obtaining new jobs, their need for and entitlement to financial assistance will be reduced or eliminated. Even if Congress had appropriated funds to implement the financial assistance component of § 43, the objectives of the statute would be fully satisfied if not a penny had to be spent because all eligible employees obtained new jobs as a result of first right of hire. Accordingly, whatever the status of the financial assistance component of § 43—that is, whether it is dormant because of a lack of appropriations or rendered inoperative because of its relationship to the invalid legislative veto—Congress obviously intended first right of hire to continue.[9]

C. Petitioners Do Not Otherwise Show That The Veto Provision Was Crucial To Enactment Of First Right Of Hire

In this Court, as in the court of appeals, Petitioners, "[f]ailing to find any direct statement evidencing a Congressional intent of inseverability, . . . advance various items of circumstantial evidence of what they perceive to be such an intent." 766 F.2d at 1563 (Pet. 24a-25a).

Thus, Petitioners argue that "[b]y strengthening the Section 43 veto in Conference and at the same time removing a veto provision from a section that was at least as controversial as Section 43, Congress unmistakably demonstrated its serious reservations about the regulatory authority delegated to DOL" (Pet. Br., p. 44). The "strengthening" to which Petitioners refer is the addition of a "report and wait" requirement that, thirty days prior to issuing rules and regulations implementing § 43, the Secretary of Labor must submit them to the House and Senate committees primarily responsible for the ADA. As

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[9] The Senate Report anticipated that, as a result of first right of hire, "few . . . employees would be without work for a long period of time" and that cash payments under the financial assistance program would thereby be decreased. Senate Report, p. 116.

the court of appeals recognized, "[t]his mechanism may reasonably be viewed as the assertion of interest by committees not normally charged with the review of the labor regulations. . ." 766 F.2d at 1564 (Pet. 25a). However, there is nothing in the record which indicates precisely why the committees had such an interest. Yet, given the controversy over the financial assistance program, the uncertainty about its cost, and especially the political sensitivity of the payment levels, almost surely the monetary compensation component of § 43 was the source of that interest, rather than the hiring preference which is at issue in this litigation. In any event, whatever the basis of the committees' interest as manifested by the addition of the "report and wait" provision, interest alone "does not indicate that the veto is inseverable, particularly since the 'report and wait' clause remains inviolate notwithstanding *Chadha*." 766 F.2d at 1564 (Pet. 25a).[10] Moreover, as to both the financial assistance and first right of hire components of § 43, the addition of the "report and wait" requirement makes it more likely, not less, that Congress would have enacted § 43 as it now stands—that is, without an operative veto provision. For, although "report and wait" does not give Congress as much control as the veto, it does give the relevant committees advance notice of proposed regulations, and, hence, the opportunity to make their views known before the regulations are actually issued and during a period when they could easily be modified. If the Secretary of Labor was nevertheless determined to issue the regulations in disregard of the committees' views, Congress could make use of the constitutional legislative process to achieve a different result. Accordingly, "report and wait" is a workable procedure

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[10] This Court made clear in *Chadha* that its ruling declaring legislative veto provisions unconstitutional was not meant to express disapproval of "report and wait" provisions, the validity of which has previously been upheld. *Chadha, supra*, 103 S.Ct. at 2776, n. 9, citing *Sibbach v. Wilson*, 312 U.S. 1 (1941).

which preserves a measure of legislative review and thereby diminishes the importance of the veto; in other words, a veto is less necessary with "report and wait" than without it. *Cf. Gulf Oil Corp. v. Dyke, supra,* 734 F.2d at 804, n. 26.

As for the removal of legislative veto language from a section other than § 43, the Senate bill provided that either house could disapprove CAB rules issued on an emergency basis modifying the automatic entry program established as part of the deregulation effort. 124 Cong. Rec. 10,701 (1978) (§ 5, S. 2493, amending § 401 of the Federal Aviation Act by, *inter alia,* adding new subsection k(11) (B)); Senate Report, p. 16. This legislative veto provision was dropped in Conference, although the Conference report is silent as to why. Conf. Report, pp. 66-67. However, the automatic entry program extended only through 1981, and emergency modification of the program during the three years it was in effect was an unlikely contingency. Furthermore, the conditions for exercise of the emergency authority were rather precisely spelled out, and use of the authority would be subject to judicial review. *See* § 12, ADA, 92 Stat. 1718, amending 49 U.S.C. § 1371(d) *inter alia* adding subpar. 7(D). In these circumstances, the Conference Committee could well have deemed a legislative veto superfluous in the automatic entry section, but still have preferred to retain the veto in § 43 in light of the authority given to the Secretary of Labor with respect to monetary compensation. In any event, absent any legislative history showing a connection between the two, it is at best a tenuous inference that because Congress deleted the veto from the automatic entry section, it would not have enacted the entirely unrelated § 43 unless a veto provision was included.

It is equally tenuous to argue, as Petitioners do (Pet. Br., pp. 28-29), that the veto provision was crucial to passage of § 43 because "only DOL's delegation to implement the EPP was made subject to a legislative veto." As the

court of appeals aptly responded, it is "hardly surprising" that § 43 was "the most likely candidate for inclusion of a legislative veto device" in what otherwise is a deregulatory statute. 766 F.2d at 1563 (Pet. 25a-25a). Thus, the basic thrust of the ADA is to limit rather than to expand the CAB's regulatory authority. *Supra*, pp. 3-4, 12-13. Congress could have decided to "indicate its preference for increased competition in a general way, leaving the particular details of reform to the Board. . ." Senate Report, p. 4. Instead, it chose to "deprive the Board of some of its discretion so that anticompetitive policies cannot reemerge in the future. . ." *Ibid.* Inasmuch as a legislative veto normally operates as a check on the manner in which an agency affirmatively uses its delegated authority, it would have made little sense to insert legislative veto provisions in the numerous sections of the ADA which operate to reduce agency discretion—that is, which require the CAB to regulate less and to allow market conditions greater play in determining routes and fares. By contrast, § 43 established a new program, and Congress could rationally desire a veto provision as a check on the newly delegated authority it conferred on the Secretary of Labor to administer that program, and especially to set payment levels. But that says nothing about whether Congress considered the veto so essential that it would not have granted the Secretary the authority it did without retaining a veto.[11]

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[11] Petitioners assert that the ADA contains "at least 25 distinct delegations of regulatory authority" (Pet. Br., p. 28). To the extent that various sections of the ADA (other than § 43) do provide for issuance of rules and regulations which could have been subjected to a veto restriction, the nature either of the authority granted or of the subject matter tends to be self-explanatory as to why there is no such restriction. Petitioners specifically mention only four such "distinct delegations" (Pet. Br., p. 29, n. 35). As just discussed, one of these, the exceedingly narrow authority to modify by rule "on an emergency basis" the automatic entry program, is readily differentiated from the § 43 type of authority. Another, the FAA's duty to establish safety standards (§ 5, 92 Stat. 1709, and § 33, 92 Stat. 1738), concerns a

Petitioners also contend that the requirement that final regulations of the Secretary of Labor implementing § 43 be promulgated within six months (*supra*, p. 16) enhanced the importance of the veto provision because it "guaranteed that the regulations would be reviewed by essentially the same members of Congress who, through their positions on the aviation committees, shaped the Deregulation Act. . ." (Pet. Br., pp. 32-33). Here again, Petitioners' contention is nothing more than speculation, unsupported by legislative history. Moreover, as the court of appeals pointed out, there is an opposing inference which is at least as persuasive: the six months requirement "could just as readily be seen as an indication of the high importance Congress attached to the employee protection plan, which Congress mandated be implemented as quickly as possible." 766 F.2d at 1564 (Pet. 26a). The latter inference surely is more consistent with the committee reports and comments made in floor debate. *Supra*, pp. 4-6, 7, 15, 17-18. Furthermore, contrary to Petitioners (Pet. Br., pp. 32-33), the six months requirement could not assure that "essentially the same members of Congress" would review the Secretary's regulations, inasmuch as the 1978 Congressional elections would have intervened between the October 23, 1978 date of enactment of the ADA and issuance of the Secretary's regulations. There obviously could be

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technical subject in which the regulatory details are more suitable for evaluation by experts than particularized oversight by Congress. The third—the CAB's duty to establish, by rule, objective criteria for designating "eligible points" for purposes of providing essential air service to small communities, and also to promulgate guidelines for "computing the fair and reasonable amount of compensation required to insure the continuation of service to any eligible point" (§ 33, 92 Stat. 1732, 1736, 1739)—merely requires elaboration of factors which the statute already sets forth in detail; hence, Congress had scant reason to fear that the criteria and guidelines would not reflect its wishes. The fourth—the CAB's obligation, under revised procedures, to consider applications for route certifications (§ 7, 92 Stat. 1711, and § 8, 92 Stat. 1712)—leaves no room for a legislative veto of anything other than the Board's processing and determination of individual cases.

no "guarantee" that the members of the Congress who were the primary sponsors of the ADA in general, and of § 43 in particular, would be reelected, or, if reelected, would have the same committee assignments.

Finally, Petitioners urge that the "unique combination of features"—the six months requirement coupled with the "review and wait" and legislative veto provisions—"create a review procedure that ensured intimate congressional involvement in the development of the EPP" (Pet. Br., pp. 31-32). For a number of reasons, this argument is farfetched. First, aside from the monetary compensation levels, Congress was sufficiently specific in § 43 as to leave little room for administrative development (especially when compared to the labor protective program proposed by the House). *Supra*, pp. 28-31. Second, the six months requirement can readily be explained as evincing Congressional interest in getting the labor protection program moving quickly rather than in legislative review of that program. Third, if continued intimate involvement in the labor protection program was a Congressional objective, it is odd, indeed, that such a seemingly significant purpose is nowhere mentioned in the committee reports or in floor debate. Instead, the Senate Report refers only to the far more modest goal of ensuring Congressional review of the "statutory percentage figures [of former wages] and maximum dollar amounts" to be set by the Secretary in connection with the financial assistance aspect of the program. Fourth, as Petitioners acknowledge (Pet. Br., p. 31), there is nothing unique about statutory deadlines for issuing regulations or "report and wait" and legislative veto provisions. Each has separately been incorporated in numerous statutes. However, as the court of appeals concluded, their combination here does not point to "anything of decisional import." 766 F.2d at 1564 (Pet. 25a). Of greater significance, we suggest, is that Section 43's veto provision is by no means the strongest rein on delegated authority that Congress could devise. In matters which Congress attached

a high priority to preserving legislative review, such as reorganization of the Executive Branch, the veto provision is considerably more elaborate and more compelling.[12] That Congress chose a weaker veto provision in § 43, when there was precedent for a stronger one, further undercuts Petitioners' argument that inclusion of the legislative veto was crucial to the section's passage.

II. THE COURT OF APPEALS APPLIED A PROPER TEST FOR DETERMINING SEVERABILITY

Petitioners concede (Pet. Br., pp. 14, 15), as they must, that the court of appeals correctly began its severability analysis with the question of whether it is "evident" that Congress would have failed to enact § 43 in the absence of a legislative veto provision. 766 F.2d 1559-60 (Pet. 16a-18a), citing *Regan v. Time, supra; Chadha v. INS, supra; Champlin Refining Co. v. Corp. Comm'n., supra; Buckley v. Valeo, supra.* However, Petitioners fault the court (Pet. Br., pp. 14-26) for asking the additional question of whether Congress would have preferred § 43, after severance of the veto provision, to "no statute at all." 766 F.2d at 1560 (Pet. 19a), citing *Gulf Oil Corp. v. Dyke,* 734 F.2d 797, 804 (T.E.C.A.), *cert. denied,* 105 S.Ct. 173 (1974).

Had the court of appeals not posed the second question and analysed the severability issue in light of the first

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[12] The Reorganization Act provides that the President is required to submit each proposed reorganization plan to Congress; immediately after such submission, resolutions of disapproval are automatically introduced in both the Senate and the House and referred to designated committees; after 45 days, the resolutions are automatically placed on the appropriate calendars in the Senate and the House even if they were not reported out of committee; any member of Congress could at this point move for consideration of the disapproval resolution; and a majority "yes" vote in either the House or the Senate would veto the plan. 5 U.S.C. §§ 909-912. Other statutes contain veto provisions along the same lines: *e.g.,* 15 U.S.C. § 3417; 29 U.S.C. § 1306; 42 U.S.C. § 2159; 42 U.S.C. §§ 8724, 8725; 43 U.S.C. § 1337(a)(4); and 50 App. U.S.C. § 2097.

question only, the result would have been exactly the same and, indeed, so would the court's analysis. For, although Petitioners contend otherwise, there is *no* "strong evidence that Congress would have preferred to enact something different" than the current § 43 if the legislative veto provision could not be included. (Pet. Br., p.26). Instead, as we have shown (*supra*, pp. 23-27), what is striking about this case is the complete lack of any such evidence in the pertinent legislative history, especially the committee reports and floor debate. As the court held, there is "ample evidence . . . that the employee protection program . . . was deemed by Congress to be an important aspect of the [Airline Deregulation] Act," but "not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan" (766 F.2d at 1565 (Pet. 28a)). This conclusion, the product of a careful search of legislative records, is dispositive of the severability issue under any plausible test.[13]

Petitioners criticize the court of appeals for failing to take into account that there are alternatives besides, on the one hand, the current version of § 43 stripped of the veto, and, on the other, no labor protective provision whatever. They argue that, had Congress known the veto provision would be struck down as unconstitutional, it might have enacted an altogether different type of protection program for airline employees or a substantially modified § 43. (Pet. Br., p. 18). If it were evident here that, but for the inclusion of the legislative veto in § 43, Congress would have chosen a different option—for instance, the

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[13] Petitioners imply that the court of appeals arrived at its conclusion by mechanical application of an erroneous standard as opposed to "a painstaking inquiry into legislative intent." (Pet. Br., p. 20). The implication does not withstand scrutiny. A substantial portion of the court's opinion was devoted to just that "painstaking inquiry into legislative intent"—as well as a thorough discussion of Petitioners' arguments—which Petitioners now accuse the court of avoiding. 766 F.2d at 1560-65 (Pet. 19a-28a).

House provision in lieu of § 43—there would be some force to the argument that the court of appeals ignored a relevant consideration. But this is not a case where a showing of that nature has been, or can be, made. There was accordingly no reason for the court of appeals to accept the unfounded speculations advanced by Petitioners as to what Congress might have done had it been prescient enough to anticipate *Chadha*.

Nor was it in any way impermissible for the court to add by way of elaboration that the "evidence . . . positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out to a deregulatory statute stripped of any employee protection plan." 766 F.2d at 1561 (Pet. 19a). Surely, a key consideration in any severability analysis is whether the end result will be an outcome Congress plainly never intended. For instance, as the court of appeals pointed out (766 F.2d at 1564-65 (Pet. 27a-28a)), in *American Federation of Government Employees v. Pierce, supra,* severance of a legislative veto provision would have left in place a complete ban on reorganizing the Department of Housing and Urban Development, a consequence which "it was abundantly clear" would have been unacceptable to Congress. Accordingly, the court in *Pierce* decided against severance. So, in the instant case, the court quite properly focused on which result—"excision of the veto provision" or "demolition of the airline employee protective prescriptions" (766 F.2d at 1565 (Pet. 29a) (concurring opinion of Ginsburg, J.)—Congress would have found least acceptable. The court had little difficulty in making that choice: as concurring Judge Ginsburg succinctly put it, whereas "[d]eletion of the veto preserves section 43 and thereby gives effect to the dominant intent of Congress," by contrast "[a] declaration of inseverability, tearing down the section in its entirety, would be far more destructive of the legislature's will. *Cf. Buckley v. Valeo,* 424 U.S. 1, 108-09. . ." *Ibid.*

The court could not very well ignore the foregoing and still be faithful to the "cardinal principle of statutory construction" which "is to save and not to destroy." *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)). Petitioners respond that "[t]o save statutes in a form inconsistent with congressional intent threatens, not preserves, the role of the legislative branch." (Pet. Br., p. 22, n. 23). Here, however, the court explicitly acknowledged that its "charge . . . to save as much of the statute as we can" must be carried out "consistent of course with the underlying legislative intent." 766 F.2d at 1560 (Pet. 18a). The search for probative legislative intent is precisely the point of the court's inquiry as to whether Congress "would have preferred no employee protection program over the program passed by Congress shorn of its veto provision." 766 F.2d at 1565 (Pet. 28a). Such an inquiry appropriately recognizes and takes into account the practical reality that a determination of inseverability would, indeed, leave the ADA with no employee protection program. And that is a result which the legislative history clearly shows to be at odds with the importance Congress attached to the program (*supra*, pp. 4-6, 7, 15, 17-18), whereas there is nothing in the committee reports or floor debate which indicates that Congress would have failed to enact § 43 in the absence of the veto provision.

Petitioners urge that "the responsibility for remedial action should be left . . . with the legislature." (Pet. Br., p. 18). But even Petitioners concede that as a necessary predicate it must "appear . . . that congressional preference would have been for a law other than that which would remain after severance. . . " *Ibid.* Here, the predicate has not even come close to being established.

In this context, then, the court of appeals was right to ask whether Congress would have wanted an ADA entirely without a labor protective provision or an ADA with the labor protective provision that had been enacted minus the

legislative veto. In responding that Congress clearly would have preferred the latter, the court adequately addressed and rejected any contention that, but for the veto provision, Congress would have withheld the delegation of authority to the Secretary of Labor to issue regulations implementing § 43. In short, it was simply not "evident" to the court that loss of the veto provision would have doomed § 43. We submit that Petitioners have failed to demonstrate either that the court did not make the appraisal required by the *Chadha—Buckley—Champlin Refining* standard, or that, in making that appraisal, the court's assessment of legislative intent was incorrect.

CONCLUSION

For the reasons set forth herein, Respondent Air Line Pilots Association urges that the decision of the court of appeals should be affirmed.

Respectfully submitted,

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